

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION  
3:09CV30-03-MU

MANUEL C. BENITEZ,

Petitioner,

v.

ALVIN W. KELLER, Jr.,<sup>1</sup>

Respondent.

**ORDER**

**THIS MATTER** is before this Court upon a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 which was filed on January 23, 2009 by the Petitioner pro se. The Respondent filed an Answer to the Petition and a Motion for Summary Judgment with a supporting brief on February 12, 2009. It appears that the Respondent may be entitled to summary judgment as a matter of law.

The Petitioner is advised that under the provisions of Rule 56(e) of the Federal Rules of Civil Procedure, he is required to submit documents, affidavits, or unsworn declarations made under penalty of perjury, in opposition to the Motion for Summary Judgment and supporting documents filed by the Respondent. Rule 56(e) reads in pertinent part as follows:

When a motion for summary judgment is properly made and supported [by affidavits], an opposing party may not rely merely on allegations or denials in his own pleadings; rather, its response must – by affidavits or as otherwise provided by this rule – set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if

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<sup>1</sup> Mr. Keller has replaced Mr. Beck as Secretary of the N.C. Department of Correction and thereby automatically replaces Mr. Beck as Respondent. See FRCP 25(d).

appropriate, be entered against that party.

This rule requires that if the Petitioner has any evidence to offer to counter the evidence contained in the Motion for Summary Judgment and supporting documents filed by the Respondent, he must present it to the Court in the form of documents, affidavits, or unsworn declarations under penalty of perjury. An affidavit is a written statement made under oath; that is, a statement prepared in writing by the Petitioner and sworn before a Notary Public. If the Petitioner chooses, he may instead submit an unsworn declaration and state the following with the date and his signature:

"I declare under penalty of perjury that the foregoing is true and correct."

**PETITIONER BENITEZ READ THIS:**

The Petitioner is further hereby advised that he has thirty (30) days from the filing of this Order in which to file documents, affidavits, or unsworn declarations in opposition to the state's Motion for Summary Judgment. **FAILURE TO RESPOND WITHIN THIS TIME PERIOD MAY SUBJECT THIS ACTION TO SUMMARY JUDGMENT.**

**THEREFORE, IT IS HEREBY ORDERED** that the Petitioner has thirty(30) days from the filing of this Order in which to provide his own documents, affidavits, or declarations countering the evidence offered by the state's Motion for Summary Judgment.

**IT IS FURTHER ORDERED** that the Clerk shall substitute Mr. Alvin W. Keller as Defendant in this matter in place of Mr. Theodis Beck.

**SO ORDERED.**

Signed: February 12, 2009

A handwritten signature in cursive script, reading "Graham C. Mullen", written over a horizontal line.

Graham C. Mullen  
United States District Judge

